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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ARTHUR CALDERON,
Warden, San Quentin State Prison, et al.,
Petitioners,

vs.

BERNARD LEE HAMILTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTIONS PRESENTED

1. Does a federal court create a "new rule" when it accepts an argument previously rejected by this Court, based on a minor variation in the facts?

2. Are the precedents established by this Court limited to the exact facts of the case, or do they establish principles of broader application?

3. Does a federal court impermissibly create a "new rule" on habeas corpus when it creates a new exception to the general rule that juries are presumed to follow their instructions?

4. Can a convicted criminal be found to be "in custody in violation of the Constitution . . . of the United States" based on an instruction to which he agreed?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has refused consent.

In the accompanying brief, *amicus* argues that (1) the Ninth Circuit's disregard of the *Ramos* precedent calls for a writ of certiorari to reestablish the binding force of this Court's precedents; (2) the Ninth Circuit's radical new exception to the principle that juries are presumed to follow their instruction has impermissibly created a new, and wrong, rule on habeas corpus; (3) modifications to a constitutional instruction agreed to by competent counsel cannot be a denial of due process; and (4) this case impacts other states besides California.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The costs of habeas review are bad enough when the federal courts merely second-guess the state courts on close questions. They become intolerable when federal courts set aside judgments of state courts which have faithfully followed this Court's precedents, based on the lower federal court's thinly veiled disagreement with those precedents. This is such a case, and it is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

May, 1994

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Fifteen years ago, Bernard Hamilton murdered Eleanore Buchanan, the young mother of two infant sons. He cut off her head and hands, which have never been found. Pet. for Cert. 2-3. It would appear that he did this for the purpose of preventing identification; he boasted after his arrest that the charge would not stick, because the police could not identify the body. In fact, they could and did. *People* v. *Hamilton*, 41 Cal. 3d 408, 416, 710 P. 2d 981, 985 (1985) ("*Hamilton I*").

Hamilton was convicted of murder in the first degree. *None* of the 15 jurists who have examined this exhaustively litigated case so far has found any ground for overturning that verdict. *Id.*, at 432, 710 P. 2d, at 995-996; *id.*, at 436, 710 P. 2d, at 999 (Grodin, J., concurring in the judgment); *ibid.* (Bird, C. J., concurring); *id.*, at 437, 710 P. 2d, at 999

(Lucas, J., concurring in part and dissenting in part); *id.*, at 439, 710 P. 2d, at 1000 (Mosk, J., concurring in part and dissenting in part); *People* v. *Hamilton*, 45 Cal. 3d 351, 363, 753 P. 2d 1109, 1117 (1988) ("*Hamilton II*"); *id.*, at 380, 753 P. 2d, at 1128 (Broussard, J., concurring in part and dissenting in part); App. to Pet. for Cert. B-272 (district court); *Hamilton* v. *Vasquez*, 17 F. 3d 1149, 1166 (CA9 1994); *ibid.* (Trott, J., concurring in part and dissenting in part).

At the time of trial, a California statute required that juries be informed of the possibility of commutation of a life-without-parole sentence. Hamilton's trial counsel objected to any such instruction being given, but after that objection was overruled, he consented to the modifications made to the basic instruction. *Hamilton* v. *Vasquez*, 17 F. 3d, at 1161.

In *Hamilton I*, the California Supreme Court reversed the finding of a special circumstance (*i.e.*, death eligibility) on the ground that the jury was not instructed on intent to kill as an element of felony murder. 41 Cal. 3d, at 431-432, 710 P. 2d 995-996. This Court vacated and remanded for harmless error analysis in light of *Rose* v. *Clark*, 478 U. S. 570 (1986). *California* v. *Hamilton*, 478 U. S. 1017 (1986). On remand, after it had decided that intent was not an element of felony murder if defendant was the actual killer, the California Supreme Court affirmed the entire judgment and denied two habeas petitions. *Hamilton II*, 45 Cal.3d, at 363-364, 380, 753 P. 2d, at 1117-1128. One Justice dissented, solely on state grounds. *Id.*, at 380, 753 P. 2d, at 1128 (opinion of Broussard, J.).

The federal district court denied habeas relief on all grounds. App. to Pet. for Cert. B-273. The Court of Appeals panel divided 2-1, granting Hamilton a new penalty trial. *Id.*, at 1166; *ibid.* (dissent).

Thus, of the 10 jurists who have examined the penalty phase after this Court's remand, only 2 have found a federal constitutional error. Seven have found no basis for setting aside the judgment.

SUMMARY OF ARGUMENT

The panel majority's opinion violates this Court's precedents at every turn. The opinion fails to follow *California* v. *Ramos* because it claims, incorrectly, that the *Ramos* Court was mistaken about California law, and because of factual differences that do not affect the underlying basis for the *Ramos* decision. It invents misleading suggestions that are not in the instruction. It takes a rare exception to the principle that juries are presumed to follow their instructions and magnifies that exception into a new, and wrong, rule.

A more fundamental problem with this case deals with the core meaning of the root constitutional command, "nor shall any State deprive a person of life, liberty or property without due process of law." How can a modification to a constitutional instruction violate this command when competent defense counsel participates in its drafting and consents to the final product? *Amicus* submits that, given effective counsel, a consensual procedure is *per se* "due process."

ARGUMENT

I. The Ninth Circuit's failure to follow *Ramos* is a shocking case of judicial insubordination.

Among the "special and important reasons" calling for a writ of certiorari is the case "[w]hen . . . a United States court of appeals . . . has decided a federal question in a way that conflicts with applicable decisions of this Court." Supreme Court Rule 10.1(c). If ever a case fit this description, this one does.

A. The Morse Factor.

In explaining its refusal to follow *California* v. *Ramos*, 463 U. S. 992 (1983), the panel majority said this:

> "The United States Supreme Court in *Ramos* did not permit the jury to speculate about the likelihood of the defendant's release on parole, for it *assumed* that the trial court would provide the jury with accurate information concerning the likelihood of commutation *and parole*.

> *Ramos*, 463 U.S. at 1004, 103 S.Ct. at 3455. Furthermore, the Court in *Ramos assumed* that the instruction did not preclude the defendant from offering any evidence regarding the Governor's power to commute a life sentence without possibility of parole. *Id.* However, California case law in effect at the time Hamilton was sentenced prevented defense counsel from showing the actual likelihood of a person ever being paroled if he were sentenced to life imprisonment. See *People* v. *Morse*, 60 Cal.2d 631, 36 Cal.Rptr. 201, 211, 388 P.2d 33, 43 (Cal. 1964).[3]
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> ---
>
> "[3] In *Morse*, the jury was deciding between the death penalty and life with the possibility of parole."

Hamilton v. *Vasquez*, 17 F. 3d 1149, 1162 (CA9 1994) (emphasis added).

Even if the premises in this reasoning were true (which they are not), the statement would still be a breathtaking assertion by a lower court. The panel majority purports to examine a precedent of this Court, determine the state law predicates of the decision, decide that those predicates were wrong, and then reject the precedent.

The Court of Appeals simply does not have such authority. "But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto* v. *Davis*, 454 U. S. 370, 375 (1982). Even *if* the *Ramos* Court really had "assumed" something about California law that was not correct, the precedent remains binding until this Court, not the Court of Appeals, overrules it. *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U. S. 533, 535 (1983).

Yet the *Ramos* Court made no false assumption. By citing *People* v. *Morse*, 60 Cal. 2d 631, 388 P. 2d 33 (1964), the Ninth Circuit has not discovered anything unknown to the *Ramos* Court. The Court knew about *Morse*, cited it, and discussed it. *Ramos*, *supra*, 463 U. S., at 1012.

The panel majority cites page 1004 for the proposition that *Ramos* "assumed" that information on the likelihood of

parole, as well as commutation, would be admissible. *Hamilton*, *supra*, 17 F. 3d, at 1162. In fact, *Ramos* only mentions "evidence or argument regarding the Governor's power to *commute* a life sentence." (Emphasis added.) There is no mention of likelihood of parole here. The portion of *Ramos* cited by the panel majority deals only with the possibility of commutation, while the portion of *Morse* cited deals only with the possibility of parole. They are not directly in conflict.

One could certainly have argued in 1981 that the prohibition on evidence of likelihood of parole from *Morse* should have been extended to cover likelihood of commutation. However, that argument would have raised the question of whether the evidentiary portion of *Morse* survived the enactment of California Penal Code section 190.3. Although California follows a strict rule of obedience to decisions of higher courts, *Auto Equity Sales, Inc.* v. *Superior Court*, 57 Cal. 2d 450, 455, 369 P. 2d 937, 940 (1962), this rule is subject to "the well-settled principle that a decision prior to the enactment of a statute affecting the subject is not a controlling precedent." *Pacific Gas & Electric Co.* v. *Superior Court*, 33 Cal. App. 3d 321, 326, 109 Cal. Rptr. 10, 13 (1973).

On the precedents existing in 1981, defendant was not by any means precluded from making an offer of proof regarding likelihood of commutation and parole and arguing that pre-*Furman*[1] case law was inapplicable to a post-*Furman* sentencing statute. Eight years after Hamilton's trial, in a case where the defendant *had* belatedly proffered evidence of likelihood of commutation, the California Supreme Court upheld the trial court's refusal to reopen the penalty phase for that purpose. However, it did not rule on the ground of the *Morse* precedent, but rather because the trial court's instruction not to consider commutation had rendered the evidence irrelevant. *People* v. *Hunter*, 49 Cal. 3d 957, 983-984, 782 P. 2d 608, 623 (1989). Thus, it is by no means clear that the rule of

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1. *Furman* v. *Georgia*, 408 U. S. 238 (1972) required the rewriting of every state's capital sentencing law, including California's.

state law the panel majority relies on was actually in force at the time of the trial.

B. The Accuracy Issue.

The present case is also not distinguishable from *Ramos* on the ground of an inaccurate versus an accurate instruction. Here is the description of commutation and parole given to the jury:

> "You are instructed that under the state constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power, a governor may, in the future, commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.
>
> "This is subject to the requirement that, in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years less one-third off for good time credits before parole may be considered by the proper authorities." *Hamilton* v. *Vasquez*, *supra*, 17 F. 3d, at 1173-1174.

The panel majority calls this description "confusing." *Id.*, at 1161. The majority then offers us this description of the commutation process:

> "In California, a person who is a twice-convicted felon such as Hamilton must apply directly to the Governor in order to have his sentence commuted. See Cal. Penal Code § 4802 (Deering 1992). The Governor, upon receipt of the application, must refer it to the Board of Prison Terms for an investigation and recommendation. *Id.* After the Board of Prison Terms makes its recommendation, it transfers the application along with the recommendation back to the Governor. See Cal. Penal Code § 4813 (Deering 1992). Even if the Board of Prison Terms recommends commutation, the Governor cannot commute a sentence of life without parole unless four justices of the

> California Supreme Court recommend commutation. See Cal. Penal Code §4852 (Deering 1992); California Constitution, Article 5 §8 (Deering 1981). Furthermore, even if both the Board of Prison Terms and four justices of the Supreme Court recommend commutation, the Governor has the authority to reject the recommendations. California Constitution, Article 5 §8 (Deering 1981)." *Id.*, at 1162.

There are two differences between the panel majority's description and the trial court's supposedly "confusing" and "inaccurate" description. First, the trial court's description is the clearer of the two. Second, the trial court omitted the mechanical detail of applying directly to the Governor and the ministerial duty of the Board of Prison Terms to investigate and make a recommendation.

The essence of the matter, however, is identical in both descriptions. The Governor and a majority of the California Supreme Court must agree before a commutation may issue. No one would surmise that the Governor of the nation's largest state would act without some kind of staff recommendation, and the fact that the Board of Prison Terms is charged with that task is a detail, not a "hurdle." Cf. *ibid.*

The panel majority also states, "The instruction as given incorrectly suggested that if the jury decided to sentence Hamilton to life without the possibility of parole, he would nevertheless be eligible for release." 17 F. 3d, at 1162. This "suggestion" is a figment of the majority's imagination. It does not appear in the instruction. The instruction correctly states that the possibility of parole can only arise through a gubernatorial commutation.

The instruction in the present case is just as accurate, for this case, as the instruction in *Ramos* was for Ramos' case. Supposed inaccuracy is no ground for the Court of Appeals' failure to follow *Ramos*.

C. The "Diversion" Argument.

Perhaps worst of all is the Court of Appeals' acceptance of the "diversion" argument. "In exercising [its] discretion, the jury must consider relevant mitigating evidence. [Cita-

tion.] The jury in this case was diverted from this task by having its attention focused on commutation procedures rather than the significant mitigating evidence defense counsel introduced at the penalty phase." 17 F. 3d, at 1162-1163.

This is precisely the argument squarely rejected by this Court in part II C of the *Ramos* opinion. 463 U. S., at 1005-1009. The *Ramos* Court did not simply reject that argument "in the circumstances of that case," as the opinion below implies. See 17 F. 3d, at 1160. *Ramos* rejected that argument as a matter of principle, based on the fundamental nature of the sentencing decision. The "diversion" argument fails because "there is no . . . 'central issue' [similar to guilt] from which the jury's attention may be diverted." *Ramos*, 463 U. S., at 1008. Certainly the defense evidence presented factors to be considered, but "the jury . . . is free to consider a myriad of factors," at this point, *ibid.*,[2] and it was on that basis, and not the specific wording of the instruction, that *Ramos* rejected the "diversion" argument, *id.*, at 1009.

"We note further that respondent [Ramos] does not, *and indeed could not*, contend that the California sentencing scheme violates the directive of *Lockett* v. *Ohio*, 438 U. S. 586 (1978)." *Id.*, at 1005, n. 19. This Court said in *Ramos* that the exact argument accepted by the Ninth Circuit in the present case was so far-fetched that it could not even be credibly made.

If the Ninth Circuit was not obliged to follow *Ramos* in the present case, then it is difficult to see how any precedent can ever be binding beyond its exact facts. "This is a classic case

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2. This case presents a prime example of why juries must be permitted to consider a myriad of factors in aggravation as well as mitigation. See generally Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Tuilaepa* v. *California*, No. 93-5131. The mitigation was a routine chorus of relatives and friends. See 17 F. 3d, at 1163. Weighed against this was Hamilton's callous mutilation of the body for the specific purpose of preventing identification. He trots out his own family to plead for him, but he so utterly lacks compassion for Eleanore Buchanan's family that, even after the guilt phase verdict, he did not reveal what he had done with her head, so they could at least give her a decent burial. See Pet. for Cert. 3.

of differences being insufficient to create a viable legal distinction." *Hamilton* v. *Vasquez*, *supra*, 17 F. 3d, at 1167 (Trott, J., dissenting). But precedents establish rules of broader application. "In short, the Court of Appeals has simply confused the factual contours of [*Ramos*] for its unmistakable holding." *Thurston Motor Lines*, *supra*, 460 U. S., at 535.

II. The Ninth Circuit created "new rules" by evading controlling precedent and by creating a new exception to the principle that juries are presumed to follow their instructions.

A. Teague and "the Merits."

Habeas corpus is not an appeal. *Sunal* v. *Large*, 332 U. S. 174, 178 (1947). This obvious statement bears repeating because it is so frequently ignored. A court hearing an appeal asks whether the trial court erred. On habeas corpus, trial court error is relevant only to the extent that it bears on the sole question which a habeas court has jurisdiction to decide: whether the warden is breaking the law by holding the prisoner in custody. See *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830).

If the state courts obeyed the rules in effect at the time of both trial and appeal, then a subsequent change in the law does not render the prisoner's custody illegal. Attempts to distinguish the *Teague*[3] issue from the "merits," see, *e.g.*, *Caspari* v. *Bohlen*, 127 L. Ed. 2d 236, 250-251, 114 S. Ct. 948, 957 (1994) (Steven, J., dissenting), thus miss the point. *Teague* is an essential part of the merits on the question of whether the prisoner is legally in custody.

The *Bohlen* majority implicitly recognized that *Teague* does go to the merits (although it used the same terminology as the dissent) when it held that the issue was "fairly included" in a question referring only to the merits. *Id.*, at 127 L. Ed. 2d, at 245, 114 S. Ct., at 953. Nonretroactivity is not

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3. *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion).

" 'analytically and factually' distinct" from the merits. See *ibid.*, S. Ct., at 952 (distinguishing *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U. S. Philips Corp.*, 126 L. Ed. 2d 396, 114 S. Ct. 425 (1993) (*per curiam*)).

Teague is not a procedural barrier that keeps illegally incarcerated prisoners in prison. *Teague* is a rule of substantive law defining what kinds of defects will render imprisonment illegal, despite the existence of an unreversed judgment by a competent court directing such imprisonment.

By creating a new rule on habeas corpus, the court below has not bypassed a mere barrier to reach an otherwise correct result. It has taken a wrong path and reached a wrong result. It has delayed justice by many years in a case where justice has already been much too long delayed. It has ordered a new trial even though the judgment is valid.

B. The Ramos Issue.

A rule favoring defendant is "new" for the purpose of this case if it was not *dictated* by precedent in effect on January 23, 1989. See *Teague*, *supra*, 489 U. S., at 301 (dictated); *Sawyer* v. *Smith*, 497 U. S. 227, 232 (1990) (date of finality is day cert. denied); *Hamilton* v. *California*, 488 U. S. 1047 (1989) (cert. denied in present case); cf. *Lockhart* v. *Fretwell*, 122 L. Ed. 2d 180, 191, 113 S. Ct. 838, 844 (1993) (*Teague* inapplicable to new rule validating judgment).

In this case, as in *Bohlen*, the only party who has a substantial argument that its position is dictated by precedent is the Attorney General. *Ramos* is as clearly on point in this case as *United States* v. *DiFrancesco*, 449 U. S. 117 (1980) was in *Bohlen*. See *Bohlen*, *supra*, 127 L. Ed. 2d, at 246-249, 114 S. Ct., at 954-956.

For reasons stated in part I of this brief and parts I and II of the Attorney General's certiorari petition, *amicus* believes that habeas relief would properly be denied even without the *Teague* rule. With the *Teague* rule, however, it is not necessary that the precedents foreclose Hamilton's argument. It is enough that they strongly suggest the opposite result. *Bohlen*, 127 L. Ed. 2d, at 248, 114 S. Ct., at 955. That *Ramos* most certainly does.

C. Jurors and Instructions.

Juries are generally presumed to follow their instructions. *Richardson* v. *Marsh*, 481 U. S. 200, 211 (1987); *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, 367 (1963). The California Supreme Court applied this general rule in the present case. The trial judge instructed the jury not to engage in the kind of speculation condemned in *People* v. *Ramos*, 37 Cal. 3d 136, 153, 689 P. 2d 430, 439 (1984) (on remand, reinstating prohibition on independent state grounds), and the state court presumed that instruction was followed. *People* v. *Hamilton*, 45 Cal. 3d 351, 375, 753 P. 2d 1109, 1125 (1988). The Ninth Circuit held, in effect, that the California Supreme Court had violated the Constitution by applying the general, time-honored rule, rather than creating a new exception to it.

In *Bruton* v. *United States*, 391 U. S. 123 (1968), this Court created a narrow exception to the presumption of obedience. That case involved the introduction of powerful hearsay evidence directly stating the ultimate fact. At a joint trial, the prosecution introduced the confession of a codefendant, who did not testify and hence could not be cross-examined, which expressly named Bruton as a perpetrator. *Id.*, at 124. Given the powerful nature of the evidence, an instruction to disregard it as to Bruton could not remedy what would otherwise be a clear violation of a core constitutional right. *Id.*, at 137.

Just how narrow the *Bruton* exception is was made clear by subsequent cases. In *Richardson* v. *Marsh*, *supra*, 481 U. S., at 203, the confession had been edited to delete any reference to Marsh. Even though the evidence was inferentially incriminating, see *id.*, at 208, the Court applied the general presumption of obedience to instructions and not the *Bruton* exception. See also *Zafiro* v. *United States*, 122 L. Ed. 2d 317, 326, 113 S. Ct. 933, 939 (1993). The *Marsh* Court refused to extend the *Bruton* exception to a situation far more damaging to the defendant than the instruction in the present case.

The majority opinion below makes no attempt to distinguish *Marsh*. It does not discuss the narrow limits of the *Bruton* exception to the general rule. It simply quotes *Bruton*

as if it were the rule, rather than the exception, and moves on. See *Hamilton* v. *Vasquez*, *supra*, 17 F. 3d, at 1163.

By declaring, in effect, that the *Bruton* exception has swallowed the *Shotwell* rule, the court below created a new rule. And a wrong rule.

III. A person cannot be deprived of due process of law by reason of a procedure to which he agreed.

The basic "Briggs Instruction" is constitutional. *California* v. *Ramos*, 463 U. S. 992 (1983). The state law issues regarding the instruction have been resolved against Hamilton by the final authority on state law. *People* v. *Hamilton*, 45 Cal. 3d 351, 375, 753 P. 2d 1109, 1125 (1988). The only questions remaining, therefore, are federal-law objections to the modifications to the instructions.

Even though Hamilton, through counsel, agreed to these modifications, *Hamilton* v. *Vasquez*, 17 F. 3d 1149, 1161 (CA9 1994), the panel majority still held that they violated due process of law. *Id.*, at 1160. How can that be?

Volenti non fit injuria is a rule of substantive law, not a procedural bar. The "victim's" consent to a boxing match does not procedurally bar a prosecution for battery; consensual boxing is simply not a battery to begin with. See R. Perkins & R. Boyce, Criminal Law, ch. 2, §2, p. 154 (3d ed. 1982).

This Court drew the distinction clearly in *Peretz* v. *United States*, 115 L. Ed. 2d 808, 111 S. Ct. 2661 (1991). In *Gomez* v. *United States*, 490 U. S. 858 (1989), the Court had held that federal magistrates could not conduct felony jury selection without the defendant's consent, but Peretz had, through counsel, expressly consented. *Peretz*, 115 L. Ed. 2d, at 815, 111 S. Ct., at 2663. The Court identified three cleanly separated questions: (1) whether the procedure violates the statute; (2) whether the procedure violates Article III; (3) if neither, whether defendant had waived his right to claim the error on appeal. *Id.*, 115 L. Ed. 2d, at 816, 111 S. Ct., at 2664. *Peretz* held that because defendant had agreed there

simply was no error. Hence the waiver question was moot. *Id.*, 115 L. Ed. 2d, at 824, 111 S. Ct., at 2671.

Similarly, the defendant's consent to the modifications in the present case do not waive an objection to a violation of due process. His consent negates the existence of any due process violation.

The Due Process Clause does not give this Court, much less the lower federal courts, supervisory authority over the state courts. *Spencer* v. *Texas*, 385 U. S. 554, 563-564 (1967); *Estelle* v. *McGuire*, 116 L. Ed. 2d 385, 397-398, 112 S. Ct. 475, 481 (1991). Disagreement with an instruction is not enough. This Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling* v. *United States*, 493 U. S. 342, 352 (1990).

The fact that a defendant, represented by competent counsel, agrees to a procedure is sufficient *by itself*, *amicus* submits, to take that procedure out of the "fundamental unfairness" category. One can, of course, imagine horror stories that would be fundamentally unfair even with consent, but consent to such procedures would necessarily be ineffective assistance. Cf. *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986).

In the present case, Hamilton's counsel would have preferred no Briggs Instruction at all, 17 F. 3d, at 1161, just as Peretz's counsel would doubtless have preferred no trial at all. But the statute was presumptively constitutional, and we now know that it does not violate the federal Constitution. Hamilton's counsel represented him effectively and obtained an instruction specifically directing the jury not to consider commutation, which was far better than the existing law at the time of trial entitled him to.

Hamilton was not denied due process by the modifications, because he consented to them.

IV. The issue in this case affects other states besides California.

The Attorney General has identified other California cases endangered by this decision. Pet. for Cert. 17. But this case goes beyond California. Commutation instructions are still being given in Illinois and Nevada. See *People* v. *Gacho*, 522 N. E. 2d 1146, 1165-1166 (Ill. 1988); *Petrocelli* v. *State*, 692 P. 2d 503, 509-511 (Nev. 1985).

The problem is especially acute in Nevada, whose judgments will eventually come before the Ninth Circuit. The ill-crafted opinion in this case gives the Nevada courts no firm basis for determining how they can craft an instruction that will comply with both their statutory mandate and the Ninth Circuit's new rule.

The opinion below contrasts the "two-sentence" instruction in *Ramos* with the longer instruction here, implying that length alone causes a supposedly impermissible "focus" on the commutation process. *Hamilton* v. *Vasquez*, 17 F. 3d 1149, 1162 (CA9 1994). Yet two paragraphs later the opinion contends that the jury was misled by not being informed of the administrative procedures for a clemency application. *Ibid.* Should a judge give more details, or fewer?

What will happen in the remaining California cases, where state *Ramos* error was found harmless, and in the Nevada cases? Federal district judges, who are bound to follow both *Ramos* and the present opinion, will have to pick through the details of each case, deciding on minor nuances whether it is more like one or the other. In such an environment, justice is more likely to be measured by the proverbial "chancellor's foot" than by the Constitution of the United States.

Unless this Court reaffirms that *Ramos* was based on a broad principle and not just the circumstances of the particular case, there will be a new area of litigatible issues in an area of law that already has far too many issues. There will be needless retrials of decade-old cases that were, in reality, correctly tried the first time. There will be further needless conflict between state courts duly endeavoring to follow *Ramos* and federal courts following the present opinion.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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